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August 27, 2008

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By e-filing

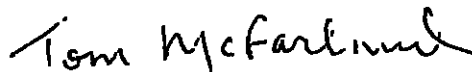
Anne K. Quinlan, Esq.
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 1149
Washington, DC 20024

Re: Finance Docket No. 35087, *Canadian National Railway Company and Grand Trunk Corporation – Control – E.J.&E West Company*

Dear Ms. Quinlan

Hereby transmitted is a Reply In Opposition To Applicants' Petition To Modify The Procedural Schedule in behalf of American Chemical Service, Inc , Aux Sable Liquid Products, LP and Equistar Chemicals, LP for filing with the Board in the above referenced matter

Very truly yours,



Thomas F. McFarland

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cc. All parties of record

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BEFORE THE
SURFACE TRANSPORTATION

CANADIAN NATIONAL RAILWAY)	
COMPANY AND GRAND TRUNK)	FINANCE DOCKET
CORPORATION – CONTROL – EJ&E)	NO. 35087
WEST COMPANY)	

REPLY IN OPPOSITION TO
APPLICANTS' PETITION TO
MODIFY THE PROCEDURAL SCHEDULE

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Date Filed: August 27, 2008
Duc Date: September 3, 2008

**BEFORE THE
SURFACE TRANSPORTATION**

CANADIAN NATIONAL RAILWAY)	
COMPANY AND GRAND TRUNK)	FINANCE DOCKET
CORPORATION – CONTROL – EJ&E)	NO. 35087
WEST COMPANY)	

**REPLY IN OPPOSITION TO
APPLICANTS' PETITION TO
MODIFY THE PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. § 1104.13(a), Protestants AMERICAN CHEMICAL SERVICE, INC (ACS); AUX SABLE LIQUID PRODUCTS, LP (Aux Sable), and EQUISTAR CHEMICALS, LP (Equistar), referred to collectively as EJ&E Shippers, hereby reply in opposition to Applicants' Petition to Modify the Procedural Schedule (Petition), filed on August 14, 2008, which seeks a conditional grant of the Application on its transportation merits, subject to later completion of environmental review.

OVERVIEW

The Petition should be denied because.

- (1) it is Board policy to deny requests for conditional grants of an application subject to completion of environmental review where (a) a possible outcome of environmental review is denial of the proposed transaction notwithstanding a prior conditional grant; and (b) there are no unique or compelling circumstances that warrant such bifurcated treatment; and

- (2) denial of the proposed acquisition on environmental grounds in the case at hand is much more than a mere possibility, and the grounds asserted in support of the request for bifurcated treatment are not unique and are much less than compelling.

IDENTITY AND INTEREST OF EJ&E SHIPPERS

EJ&E SHIPPERS are three corporations that have facilities that currently are served by EJ&E, and who are opposed to CN's proposed acquisition of EJ&E unless it were to be conditioned in a manner to sufficiently replace the loss of rail competition, loss of quality of rail service, and loss of railcar storage capacity that would result from such acquisition.

ACS is a manufacturer of specialty chemicals. ACS's facilities at Griffith, Indiana have been rail-served by EJ&E for nearly 20 years. A nearby CN track has provided ACS with a build-in or build-out option that would be lost as a result of the proposed acquisition. ACS has opposed that acquisition unless it is conditioned in a manner sufficient to replace that lost competition. *See CSX Corp. - Control - Conrail, Inc.*, 3 S.T.B. 196, 260 (1998). In comments filed in this proceeding, the United States Department of Transportation has taken the position that the Board should impose the condition sought by ACS. In the absence of imposition of such a condition, ACS seeks a condition that would preserve the service frequency and favorable rail contract terms provided by EJ&E to ACS. *See Opposition Statement and Request for Conditions* filed by ACS on January 28, 2008.

Aux Sable's large liquid natural gas plant and Equistar's large polymers plant are neighbors served by EJ&E at East Morris, Illinois. Between them, Aux Sable and Equistar account for approximately 10,000 carloads of high-rated freight per year. Aux Sable and Equistar have opposed the proposed acquisition unless it is conditioned in a manner sufficient to

offset the loss of competition furnished by EJ&E as a neutral regional carrier, the loss of highly-responsive rail service provided by EJ&E as a local service provider, and the loss of railcar storage capacity available at EJ&E's East Joliet Yard. See Notice of Adoption of Evidence and Argument and of Common Position filed jointly by Aux Sable and Equistar on February 29, 2008.

EJ&E Shippers oppose CN's Petition because a conditional grant of CN's application would be contrary to Board policy, has not been justified by CN, and would be unduly prejudicial to the interests of opponents of the proposed acquisition.

ARGUMENT

I. IT IS BOARD POLICY TO DENY REQUESTS FOR CONDITIONAL GRANTS OF AN APPLICATION, SUBJECT TO THE COMPLETION OF ENVIRONMENTAL REVIEW, WHERE A POSSIBLE OUTCOME OF ENVIRONMENTAL REVIEW IS DENIAL OF THE PROPOSED TRANSACTION NOTWITHSTANDING A PRIOR CONDITIONAL GRANT, AND THERE ARE NO UNIQUE OR COMPELLING CIRCUMSTANCES THAT WARRANT SUCH BIFURCATED TREATMENT

It formerly was Board policy to conditionally grant petitions for exemption from 49 U.S.C. § 10901 for construction of track, subject to later completion of environmental review of the proposals. That policy was discontinued (without Board explanation) in *Ameren Energy Generating Co. -- Constr. and Oper. Exempt -- in Coffeen and Walshville, IL*, 2004 STB LEXIS 284 (Finance Docket No. 34435, decision served May 5, 2004), in which the Board dispensed with a conditional grant of the petition for exemption of track construction.

In *Alaska Railroad Corp. -- Const. and Oper. Exempt -- Rail Line between Eielson Air Force Base (North Pole) and Fort Greely (Delta Junction), AK*, 2007 STB LEXIS 579 (Finance Docket No. 34658, decision served October 4, 2007), the Petitioner for a track construction

exemption “requeste(d) that (the Board) conditionally grant the requested exemption authority by addressing the transportation aspects of the project in advance of the environmental issues” (*id.* at *2). The Petitioner asserted that a preliminary decision on the transportation merits would enhance its ability to secure financing and allow it to finalize details relating to the engineering of the project, procure equipment and materials, plan and arrange construction contracts, and work on permitting requirements. (*Id.*). The Petitioner stated that it must be confident that regulatory approval for the project is obtainable before it undertakes the costly tasks identified above. (*Id.*).

The Board denied the Petitioner’s request, stating at 2, (emphasis added):

While the Board has made conditional grants of construction exemption authority in the past, the benefits to a construction applicant have always been subject to question, given the fact that the Board must consider the environmental effects of the construction proposal before any final approval can be given and before any construction may begin. A possible outcome of that environmental review is denial of the construction proposal notwithstanding a prior conditional grant. That is one of the reasons the Board has made no conditional grants of construction exemption authority since before issuance of the decision in *Ameren Energy Generating Company -- Construction and Operation Exemption -- in Coffeen and Walshville, IL*, STB Finance Docket No. 34435 (STB served May 5, 2004) (*Ameren*) n¹ Therefore, while we will not rule out a future conditional grant in a case of some unique or compelling circumstances, in the absence of a showing of such circumstances, we believe that the better course is that we not decide the transportation merits of a construction proposal until a complete record, including the environmental record, is before us.

n¹ In *Ameren*, a similar request for a conditional grant of a construction exemption was tacitly denied in a decision that instituted a proceeding under 49 U.S.C. 10502(b).

The case before us reflects no unique or compelling circumstances. ARRC has not demonstrated that a two-step decisional process is needed for it to obtain the necessary funding. Nor has ARRC demonstrated that the engineering, procurement, contracting, and permitting processes related to the construction project cannot move forward while the environmental review progresses. (footnote omitted). Accordingly, ARRC’s request for a conditional grant of the requested exemption authority, subject to the completion of the environmental

review process, will be denied. By this decision, we are instituting a proceeding under 49 U.S.C. 10502(b).

*See, also, Holrail, LLC -- Const. and Oper. Exempt. -- in Orangeburg and Dorchester Counties, SC, 2004 STB LEXIS 668 at *5 (Finance Docket No. 34421, [Sub-No. 1], decision served October 20, 2004).*

The policy that was formalized in the *Alaska Railroad* case, *supra*, continues to be the policy of the Board. While that policy was adopted in the context of requests for conditional grants of petitions for exemption of track construction, the policy surely has equal application to conditional grants of applications for authority to control rail carriers, or for any other applications in which the Board considers both the transportation merits and environmental effects of the transaction under consideration.

II. DENIAL OF THE PROPOSED ACQUISITION ON ENVIRONMENTAL GROUNDS IN THE CASE AT HAND IS MUCH MORE THAN A MERE POSSIBILITY, AND THE GROUNDS ASSERTED IN SUPPORT OF THE REQUEST FOR BIFURCATED TREATMENT ARE NOT UNIQUE AND ARE MUCH LESS THAN COMPELLING

A petition for exemption or an application for authority can be denied on environmental grounds notwithstanding that such petition or application otherwise may satisfy the statutory standard for approval on the transportation merits. A case in point is *Construction and Operation - Indiana & Ohio Ry. Co.*, 9 I.C.C.2d 783 (1993), where the Interstate Commerce Commission said (at 790-791):

We are mindful that, while NEPA requires this agency to take a hard look at the environmental consequences of our decision (footnote omitted), it does not mandate a particular result. *Robertson v Methow*, 490 U.S. 332, 250 (1989). Once the adverse environmental effects of a proposed action have been adequately identified and evaluated, we may conclude that other values outweigh the environmental cost. We may, however, use the evidence and analysis developed

through the environmental process in rendering our decision on the merits. (at 790).

* * *

After weighing the adverse impact of this line's construction on public safety against the transportation benefits noted above and in the Appendix, however, we conclude that Applicants have failed to meet their burden of showing that building the line is permitted or required by the public convenience and necessity. The reduced costs of operation by the I&O Railway constitute an increase in efficiency that, given the competitive nature of I&O Railway's service, could be expected to be passed on, at least in part, to the shipping public. But, as the Final EIS and Draft EIS explain, the location of this line would create public safety problems that simply cannot be adequately mitigated. Thus, this is a case where public safety concerns outweigh the transportation benefits of the proposed line, and therefore, the application is denied.

In light of these findings, the effect of this decision will be to maintain the *status quo*. Therefore, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources (at 790-791)

See, also, Ozark Mountain Railroad - Construction Exemption, 1994 ICC LEXIS 271, wherein the ICC revoked a conditional grant of exemption for track construction, stating (at *14-15, emphasis added).

When we granted Ozark a conditional exemption, we were not aware of the substantial public opposition to the proposal that has since materialized. We have, as Ozark notes, granted conditional exemptions from section 10901 in many construction cases. In those instances, we have preliminarily found that the proposed construction satisfied the exemption criteria of section 10505, but withheld a final grant of the authority to build the line pending the completion of the analysis of the environmental impact of the construction. That procedure works well in noncontroversial construction cases. But we have not employed it in cases where significant opposition has been expressed to the proposed project. In controversial cases, the applicant typically has filed a formal application. *See Construction and Operation -- Indiana & Ohio Ry., Co.*, 9 I.C.C. 2d 783 (1993) and *Tongue River Railroad Company -- Application*, Finance Docket No. 30186 (Sub-No. 2). Given the information that has been presented in this proceeding, we are unable to assume, as we do in exemption cases, that regulation is not necessary to carry out the national rail transportation policy. *See, e g*, 49 U.S.C. 10101a(3), (4), and (8).

In light of the unprecedented strength of the opposition to the proposed acquisition on environmental grounds in the case at hand, and the quality of the environmental evidence in opposition to the proposed acquisition, it is much more than a mere possibility that the acquisition will be denied upon completion of environmental review. There are many citations from the record that could be set forth here in support of that proposition. However, the most effective means to demonstrate it is to point to a recent statement made by Commissioner Buttrey, concurring in the Board's decision in this proceeding served July 25, 2008, at 7, viz , emphasis added:

The Board must be very sensitive to the environmental issues being raised by local communities, and I am confident that these concerns will be fully explored and considered in the EIS being prepared on the schedule we adopt today. I urge all interested parties to participate actively in this process. At the end of the environmental review process, I will carefully consider the recommended mitigation conditions that are generated, and they will factor importantly in my decision-making process. However, based on what I see now on the record, and what I saw when I recently visited the affected communities, it is hard for me to imagine how even the most far-reaching mitigation measures would be enough to offset or balance the environmental detriments that would flow from this proposal.

The Commissioner's statement takes on added weight because he took the time to view the environmentally-affected areas first-hand.

All of the foregoing factors militate strongly toward denial of the Petition. The only argument that Petitioners muster to the contrary is that a conditional grant of the application would spare CN from the effect of its own mistake in not allowing enough time for a Board decision in its purchase contract with United States Steel Company. But rescuing a party from its contractual difficulties is neither a unique nor compelling ground for a conditional grant of Board authority, nor is it an appropriate province of the Board. The Board's proper concern is the broad

public interest in orderly procedure, not CN's narrow individual interest in deviation from that procedure

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for all of the reasons stated, Applicants' Petition should be denied

Respectfully submitted,

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Date Filed: August 27, 2008
Due Date: September 3, 2008

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2008, I served the foregoing document, Reply In Opposition To Applicants' Petition To Modify The Procedural Schedule, by e-mail to David A. Hirsh, *dhirsh@harkinscunningham.com*; by UPS overnight mail to counsel for Applicants, i.e., Paul A. Cunningham, David A. Hirsh, and James M. Gunivan, Harkins Cunningham, 1700 K Street, N.W., Suite 400, Washington, DC 20006-3804; and by first-class, U.S. mail, postage prepaid, on all other parties of record.



Thomas F. McFarland